STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF TRANSPORTATION

In the Matter of the Proposed Adoption of Rules of the Minnesota Department of Transportation Governing Requirements for Subcontracting to Targeted Group Businesses on State-Aid Contracts.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for a public hearing before Administrative Law Judge Bruce D. Campbell, commencing at 9:30 a.m. on March 8, 1994, at the offices of the Minnesota Department of Transportation at the Water's Edge Building, Roseville, Minnesota, and continued until all interested persons present had an opportunity to participate by asking questions and presenting oral and written comment.

This Report is part of a rulehearing procedure required by Minn. Stat. §§ 14.01 - 14.28 (1993), to determine whether the proposed rules relating to state-aid transportation contract awards to targeted group businesses should be adopted by the Commissioner. Debora Ledvina, Attorney at Law, appeared on behalf of the Minnesota Department of Transportation (MnDOT). Also present at the hearing, representing MnDOT, were Julie A. Skallman, Mark Gieseke, Carl Fransen, and Ernest L. Lloyd. No witness was solicited to appear on behalf of the Department at the hearing.

Fifty-two members of the public signed the hearing register at the hearing and 14 persons provided oral comments. At the hearing, MnDOT submitted Exhibits A-Q, inclusive. The Administrative Law Judge also received Public Exhibits 1-3, inclusive, at the hearing.

The record in this proceeding closed for all purposes on April 4, 1994.

The Commissioner must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Commissioner of actions which will correct the defects and the Commissioner may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Commissioner may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Commissioner does not elect to adopt the suggested actions, he must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Commissioner elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Commissioner may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Commissioner makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then he shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Commissioner files the rule with the Secretary of State, he shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On December 16, 1993, the Department of Transportation filed the following documents with the Chief Administrative Law Judge:

(a) A copy of the proposed rules certified by the Revisor of Statutes.
(b) The Order for Hearing.
(c) The Notice of Hearing proposed to be issued.
(d) The Statement of Need and Reasonableness.

2. On January 3, 1994, a Notice of Hearing and a copy of the proposed rules were published at 18 State Register 1589.

3. On December 21, 1993, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice. Additional discretionary notice was also given. Ex. F.

4. On December 21, 1993, the Department filed the following documents with the Administrative Law Judge:

(a) The Agency's certification that its mailing list was accurate and complete.
(b) The Agency's certification that it mailed Notice to all persons on the Agency's list.

5. On January 3, 1994, the Department filed the following documents with the Administrative Law Judge:
(a) The Notice of Hearing as mailed.
(b) An Affidavit of Additional Notice.
(c) A copy of the State Register containing the proposed rules.
(d) The Agency's certification that it mailed a Corrected Notice.
(e) Materials received by MnDOT in response to its Notice of Solicitation of Outside Opinions as well as a copy of the State Register containing the Solicitation.

6. On January 4, 1994, the Department filed, with the Administrative Law Judge, a certification that it mailed a Statement of Need and Reasonableness to the LCRAR.

7. On February 28, 1994, the Department filed with the Administrative Law Judge proposed modifications to the rules.

The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

8. On March 8, 1994, the date of hearing, the Department filed the following documents with the Administrative Law Judge:

(a) The names of MnDOT personnel at the hearing.
(b) Targeted Group Business Goal Specifications.
(c) Statistical Information on State-Aid Contracts.
(d) Informal Attorney General Opinion, re Faribault County.
(e) A copy of Minnesota Rules Governing Contracts.

9. The period for the submission of initial written comments and statements remained open through March 28, 1994. The record closed for all purposes on April 4, 1994, the fifth business day following the close of the initial comment period. The time for the issuance of this Report has been extended in writing by the Chief Administrative Law Judge due to the schedule of the Administrative Law Judge following the close of the hearing record. This Report was issued within the period of extension granted by the Chief Administrative Law Judge.

10. At the hearing herein, the Department filed with the Administrative Law Judge as Exhibit M, Proposed Amendments to the Rules. In its Responsive Comments of April 4, 1994, the Department also proposed two amendments to the rules as contained in Ex. M. With its Reply Comments, the Department also submitted a final draft of the proposed rules with the changes to Exhibit M resulting from public hearing comments or subsequent written submissions. A copy is attached hereto as Exhibit A. For purposes of this Report, the Administrative Law Judge will rely on Exhibit A hereto for the text of the Department's final proposals in this proceeding. The proposed additions and amendments were either presented at the hearing prior to the receipt of any testimony or were the result of public comments and submissions.

Nature of Proposed Rules

11. The Commissioner of Transportation, under Minn. Stat. § 161.321 (1992) which is applicable on its face to the state highway system, proposes to adopt rules creating goal requirements for the state portion of county state-aid highway construction contracts and the state portion of the municipal state-aid street construction contracts to be subcontracted to targeted group businesses (TGBs). Minn. Stat. § 161.321, subd. 6 (1992), authorizes the Commissioner to propose rules to carry out section 161.321 (1992). Minn. Stat. §§ 162.02, subd. 2 and 162.09, subd. 2 (1992), authorize the Commissioner to propose rules governing the state-aid highway and street program for counties and cities respectively. Under Faribault v. Minnesota Department of Transportation, 472 N.W.2d 166, 169 (Minn. Ct. App. 1991), the State may enforce prevailing wage law on projects funded in whole or in part by city or county state-aid highway and state-aid street funds. Based on Faribault, supra, and the advice of the Attorney General's Office, MnDOT proposes to extend compliance with Minn. Stat. § 161.321 (1992), relating to the state trunk highway system, to all city and county

construction projects funded by state-aid. The Department's objective is to provide greater opportunity for TGBs by extending MnDOT's TGB program for state funded construction contracts to city and county state-aid construction programs.

Statutory Authority

12. In its Statement of Need and Reasonableness, the Department relied primarily on Minn. Stat. § 161.321 (1992), for authority to adopt rules creating goal requirements for portions of state-aid funded highway construction contracts and state-aid funded street construction contracts to be subcontracted to Targeted Group Businesses (TGBs). SONAR, p. 1. The Department believes that Minn. Stat. § 161.321, subd. 6 (1992), gives the Commissioner the necessary rulemaking authority. The Department does note, however, that Minn. Stat. § 162.02, subd. 2 (1992), and Minn. Stat. § 162.09, subd. 2 (1992) and other portions of Minn. Stat. c. 162 (1992) hereinafter described, are also grants of rulemaking authority to the Commissioner to promulgate rules governing the state-aid programs for county highway and city street construction.

At the hearing herein, the authority of the Commissioner to promulgate these rules under Minn. Stat. § 161.321, subd. 6 (1992), was questioned. The Department relied upon Faribault County v. Minnesota Department of Transportation, 472 N.W.2d 166 (Minn. App. 1991), to establish that the state-aid funds involved are state funds and, therefore, the state-aid portion of the financing makes Minn. Stat. § 161.321 (1992) literally applicable. Minn. Stat. § 161.321, subd. 6 (1992), is a grant of rulemaking authority to implement Minn. Stat. § 161.321 (1992).

At the hearing, several commentators, including the Associated General Contractors of Minnesota, contended that the statutory section cited by the Department was inapplicable to these rules and that Faribault County v. Minnesota Department of Transportation, supra, did not expand Minn. Stat. § 161.321 (1992), to authorize the promulgation of the proposed rules. The Department defended its interpretation of Faribault County, supra, and introduced a written advice letter from the Office of the Attorney General related to the issue of statutory authority. Ex. P.

After the hearing, the same Assistant Attorney General who initially advised the Department through Exhibit P, filed a Brief with the Administrative Law Judge, arguing that the Commissioner had statutory authority to adopt the proposed rules. The Associated General Contractors of Minnesota engaged the law firm of Moore, Costello & Hart to render an opinion on the question of whether there was a statutory basis for requiring that local governmental units participate in Mn/DOT's Targeted Group Business program as a condition of using state or state-aid funds under Minn. Stat. § 161.321 (1992). That Memorandum submitted to the Associated General Contractors of Minnesota and through that organization to the Administrative Law Judge concludes that no such statutory authority exists and that Faribault County v. Minnesota Department of Transportation, supra, does not require a different result. The only other comment made in the record about the statutory authority of the Commissioner to adopt the proposed rules was made by the Associated Builders and Contractors Minnesota chapter which expressed verbal sentiments similar to those of the Associated General Contractors of Minnesota. Tr. 89. One written submission by Blue Earth County, dated March 24, 1994, did question whether funds set aside by the Minnesota Constitution and State legislation as the local portion of the state highway trust fund were state funds subject to control by the Commissioner. That same question was directly posed in Faribault County v. Minnesota Department of Transportation, supra. As the court in Faribault County, supra, noted:

The Minnesota Constitution provides for the construction, improvement, and maintenance of a county state-aid highway system and a municipal state-aid street system. Minn. Const. Art. XIV, §§ 3, 4. To pay some of the costs associated with these two systems, the Constitution created a county state-aid highway fund and a municipal state-aid street fund. Minn. Const. Art. XIV, §§ 7, 8.

The money in these two funds is generated by highway user taxes that the legislature is authorized to levy under Minn. Const. Art. XIV, §§ 9, 10. Money from the two funds is paid directly to governmental subdivisions to finance projects contracted for by the governmental subdivisions. Minn. Stat. §§ 162.02-.09, 162.12-.15.

472 N.W.2d at 167. The court specifically held that the dedication of such funds in the Constitution and State legislation did not make such funds local funds:

Because the legislature ultimately determines the amount of tax proceeds to be paid to each of the funds and also determines the amount that a local government unit receives from the funds, we believe the funds must be considered state funds.

472 N.W.2d at 170.

The Administrative Law Judge must initially determine whether Minn. Stat. § 161.321 (1992), and particularly subd. 6 of that section, authorizes the adoption of the proposed rules, either directly or through application of Faribault County v. Minnesota Department of Transportation, supra. Minn. Stat. § 161.321 (1992), on its face, applies to the state trunk highway system and not the state-aid county highway fund or the state-aid street fund. Not only are the three separate funds recognized in the State Constitution and in separate portions of Minnesota Statutes, but, by internal evidence, Minn. Stat. § 162.321 (1992) does not apply to state-aid highway and street funds.

Minn. Stat. § 161.321 (1992) is found in the chapter of Minnesota Statutes relating to the state trunk highway system; provisions relating to the state-aid systems are found in Minn. Stat. c. 162 (1992). Moreover, Minn. Stat. § 161.321, subd. 1(b) (1992), specifically provides that the word "contract" used in the section, as limiting the application of the section, means "an agreement entered into between a business entity and the State of Minnesota for the construction of transportation improvements". The portion of the statutes within which Minn. Stat. § 161.321 (1992), is found relates to construction contracts. Minn. Stat. § 161.315 (1992), states the legislative intent applicable to Minn. Stat. § 161.321 (1992) as follows:

Subdivision 1. Legislative intent. Recognizing that the preservation of the integrity of the public contract process of the department of transportation is vital to the development of a balanced and efficient transportation system, the legislature hereby determines and declares that: (1) the procedures of the department for bidding and awarding public contracts . . . ; (2) the opportunity to be awarded department contracts . . . ; . . . .

Only if the State of Minnesota is a contracting party to the contract is Minn. Stat. § 161.321 (1992) applicable. In this portion of the analysis, the Administrative Law Judge is not questioning the propriety of the goals advocated by the Commissioner in the proposed rules, only the legal analysis relied upon to support his authority to adopt them. If Minn. Stat. § 161.321 (1992), applies to the state trunk highway system and entirely separate portions of the statutes apply to the county state-aid highway system

and the state-aid street system, Minn. Stat. § 161.321 (1992), however meritorious in its own right, cannot be directly applied to authorize the proposed rules.

The legislative history of Minn. Stat. § 161.321 (1992) also establishes that the Legislature intended to limit its direct application to the state trunk highway system. A state purchasing program to benefit small businesses owned and operated by socially or economically disadvantaged persons was first enacted by the Minnesota Legislature in 1975 under the Department of Administration. Similar programs followed at the Minnesota Department of Transportation, the University of Minnesota, and the Metropolitan Agencies defined in Minn. Stat. § 471.121, subd. 5a (1992). The Legislature wanted to encourage small businesses owned by disadvantaged Minnesotans by allowing them an expanded opportunity to do business with the state as a contracting party. The purpose was an economic development initiative to benefit the disadvantaged companies and the entire state. Changes were made to the program definition in 1980 to include racial minorities, women, and persons who had suffered a substantial physical disability. In 1988, set-aside programs were also provided for persons employed in counties with a stated low median income for married couples. Mn/DOT's state program, mandated by the Legislature in 1977, was open to businesses qualifying under the Department of Administration's definition. Two percent of the Department's road construction projects in which the Department was the contracting party were set aside for economically disadvantaged businesses.

In April of 1989, the set-aside programs were jeopardized by the United States Supreme Court in rulings which declared similar set-aside programs in Virginia and Michigan based on race and gender unconstitutional. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989); Milliken v. Michigan Road Builders Association, 109 S. Ct. 1333 (1989). Since the Legislature in 1989 concluded that the existing set-aside programs would be held unconstitutional under the two Supreme Court cases noted, they adopted an interim program based not on gender or race, but rather on the economic status of the business. Laws of 1989, c. 352, § 14. The same session law created a Small Business Procurement Commission to assure that minority and women's businesses knew of the existence and purpose of the Commission, to determine the need for race-and-gender based business assistance programs, to recommend appropriate statutory or regulatory changes, and to recommend programs targeted to small businesses in need of assistance. The legislation also established a race-and-gender-neutral program for economically disadvantaged small businesses.

The Legislative Commission established by the 1989 session law was to report its findings and recommendations for legislative action to the Governor and the Legislature by January 31, 1990. Laws of 1989, c. 352, § 1, subd. 3. The Small Business Procurement Commission submitted its report to the Minnesota Legislature on January 31, 1990. That report, entitled "A Foot in the Door: Ensuring Fair Market Access for Femaleand Minority-Owned Businesses", will hereinafter be discussed. For a detailed discussion of the legislative history of set-aside programs in Minnesota, see, Set-aside Programs in Minnesota: The Effects of City of Richmond v. J. A. Croson Co., 17 William Mitchell Law Review, 467 (1991).

In adopting the session law which revised a number of Minnesota laws regarding set-asides applicable to state agencies and metropolitan agencies, the Legislature relied on the report issued by the Legislative Commission in January of 1990. From a review of that report, the focus of the Commission and of the Legislature's set-aside programs were state agencies and other agencies that had historically participated in the set-aside programs since 1975. It was not to generally expand set-aside programs.

The concern was to make the requisite findings necessary to sustain such programs under the Supreme Court decisions previously discussed. At page 2 of the Commission's report, in describing the set-aside provisions relative to the Department of Transportation, the Commission states:

Mn/DOT's state program, mandated by the legislature in 1977, was open to businesses qualifying under the Department of Administration's definition. Two percent of the Department's road construction projects was set aside for small businesses, SED small businesses or contractors that guaranteed that they would use such small businesses as subcontractors. (Emphasis added.)

Similarly, in reviewing its findings beginning at page 61 of the Report, the Commission finds as follows:

That public and private purchasing agents, business owners, contractors, financial institutions, and surety agents have discriminated and do discriminate against female- and minority-owned businesses doing business with the state of Minnesota on the basis of the gender and race of the owners of these businesses. (Emphasis added.)

It was with this in mind, and to implement the recommendations of the Legislative Commission, that the Legislature amended all of the programs dealing with set-asides by state agencies and Metropolitan Agencies involved in state contracts in Laws of 1990, c. 541. That session law, at § 18-23, amended Minn. Stat. § 161.321 (1990), to include the targeted business set-asides which are the subject of the proposed rules. That session law makes specific reference in different sections of the Act to set-aside programs applicable to the following: the Department of Administration; the Department of Transportation; the State Board for Community Colleges; the Regents of the University of Minnesota; the Department of Transportation; the Metropolitan Council; and the Metropolitan Agencies specified in Minn. Stat. §§ 473.143 and 473.121 (1990).

It is also important to note that section 26 of Laws of 1990, c. 541, amends Minn. Stat. § 471.345, subd. 8 (1988) to allow municipalities, at their discretion, to award a portion of their procurement contracts in construction projects to Targeted Group Businesses. Hence, the very session law which added Minn. Stat. § 161.321 (1990), did not mandate, but made permissive, the use of set-asides for the contracts to which the municipality is a party. Certainly, in adopting Laws of 1990, c. 541, the Legislature was aware of the existence of state-aid highway funds and state-aid street funds and their provision to local units of government for local road expenditures. In spite of that knowledge, however, it only included within the state trunk highway statutes a provision relating to contracts to which the State of Minnesota is a party and made the use of such set-asides permissive where the municipality or other local unit of government is the party to the contract. That is only consistent with a desire on the part of the Legislature to limit set-aside programs in accordance with the history of such programs and the purpose of the 1989-1990 Legislative Commission: to mandate set-aside goals where the state is a direct party to the undertaking. Therefore, the legislative history of Minn. Stat. § 161.321 (1992), and the other set-aside programs does not support the literal application of Minn. Stat. § 161.321, subd. 6 (1992) to authorize the adoption of the proposed rules.

The only argument advanced by the Department that would allow the Administrative Law Judge to apply Minn. Stat. § 161.321 (1992), directly to nontrunk highway system contracts involves the appropriate reading of Faribault County v. Minnesota Department of Transportation, supra. That decision only held that

the monies received from the state government by local units of government from the state-aid highway trust fund and the state-aid street trust fund were state funds for purposes of § 177.41 (1990). That statute applied the state's prevailing wage law to all projects "financed in whole or in part by state funds". The Legislature had already decided through the statute that the use of any state funds would automatically trigger application of Minn. Stat. § 177.41 (1990). The case does not hold that the state, by supplying funds through the state-aid county highway trust fund or the state-aid street fund becomes a contracting party with the local unit of government. Faribault County v. Minnesota Department of Transportation, supra, would apply if section 161.321 (1992) defined the word "contract" to mean an agreement entered into between a business entity and the State of Minnesota or a local unit of government using state funds for the construction of transportation improvements. Needless to say, Minn. Stat. § 161.321, subd. 1(b) (1992) does not so provide.

The Attorney General's Office in its informal opinion and in its Brief offers no additional reason in law or policy why Minn. Stat. § 161.321 (1992), should be held to provide the requisite authority for the adoption of the rules either literally or through application of Faribault County v. Minnesota Department of Transportation, supra. The unstated assumption of the Office of the Attorney General appears to be that Minn. Stat. § 161.321 (1992) applies wherever state funds are used, irrespective of the identity of the contracting parties. As previously discussed, both the literal provisions of the statutes and the legislative history of Minn. Stat. § 161.321 (1992), require a different conclusion.

The Administrative Law Judge does not conclude that Minn. Stat. § 161.321 (1992), and Faribault County v. Minnesota Department of Transportation, supra, are irrelevant to this proceeding. The statute is certainly an expression of state policy with respect to the use of state funds when the state is a contracting party as is Minn. Stat. § 16B.19, subd. 2a and subd. 2c (1992) and the rules of the Department of Administration implementing the statute. The same policy is applicable at the federal level. 49 C.F.R. 23, Subtitle A, attached to Comments of the Inter Governmental Compliance Institute, Inc., received on March 28, 1994.

It is clear, therefore, that at least with respect to federal funds and identified state funds there is a federal and state policy to remedy past discrimination and economic exclusion of minorities by providing special consideration to small businesses that are controlled by defined groups of disadvantaged persons in federal and state contracts and in federal and state purchases. As noted by the court in Faribault County v. Minnesota Department of Transportation. supra, the state-aid funds are to be considered state funds for purposes of applying the prevailing wage statute. The question arises, therefore, whether the same stated public policy should be extended to state funds that are made available to local governmental units for highway and street construction purposes irrespective of the local nature of the expenditure. Further, if the state policy reflected in Minn. Stat. § 161.321 (1992) and Minn. Stat. § 16B.19 (1992) is a general state legislative policy, it must be determined whether the Commissioner has authority to foster that policy with respect to state-aid county highway fund projects and state-aid street projects through general grants of rulemaking authority contained in other portions of the statutes that do relate specifically to those two identified funding programs. See, Minn. Stat. § 162.02, subd. 1 and Minn. Stat. § 162.09, subd. 1 (1992).

Minn. Stat. c. 162 (1992), relates to the state-aid system. Minn. Stat. §§ 162.02-162.08 (1992), relate to the county state-aid highway system. Minn. Stat. §§ 162.09-

162.14 relate to the municipal state-aid street system. Minn. Stat. § 162.02, subd. 1 (1992), in relevant part, provides:

There is hereby created a county state-aid highway system which must be established, located, constructed, reconstructed, improved, and maintained as public highways by the counties under rules not inconsistent with this section made and promulgated by the commissioner as provided in this chapter.

Minn. Stat. § 162.02, subd. 2, sets up a rules advisory committee to advise the Commissioner with membership selected by the county boards. If the advisory committee and the Commissioner cannot agree on a proposed rule with respect to the county state-aid highway system, the decision of the Commissioner is final. The rules must be promulgated according to the Minnesota Administrative Procedure Act and have the force and effect of law. Minn. Stat. § 162.09, subd. 1 (1992), in relevant part, provides:

There is hereby created a municipal state-aid street system within cities having a population of 5,000 or more . . . . The system shall be established, located, constructed, reconstructed, improved and maintained as public highways within such cities under rules, not inconsistent with this section, made and promulgated by the Commissioner as hereinafter provided.

Minn. Stat. § 162.09, subd. 2 (1992), establishes an advisory committee for the municipal state-aid street system comparable to that for the counties, previously discussed. The membership of the advisory committee is specified by statute. If the committee and the Commissioner cannot agree on the promulgation of the proposed rule, the Commissioner's determination is final. Finally, the rules so adopted by the Commissioner have the force and effect of law, if they are adopted in accordance with the Minnesota Administrative Procedure Act.

The Department argues that even if Minn. Stat. § 161.321 (1992), does not apply to the state-aid highway and street system, the general authority to adopt rules granted to the Commissioner in the sections noted can be relied upon to provide the necessary statutory authority to adopt the proposed rules. In its Brief to the Administrative Law Judge submitted on April 4, 1994, after asserting that this case is governed by Faribault County v. Minnesota Department of Transportation, supra, the Office of the Attorney General argues in the alternative that the above-cited sections of Minnesota Statutes, as well as Minn. Stat. §§ 162.08, subd. 2, 162.14, subd. 1, 162.08, subd. 10, and 162.14, subd. 4 (1992), allow the Commissioner to apply the legislative policy contained in Minn. Stat. § 161.321 (1992), to the state-aid system.

The argument of the Office of Attorney General appears to be that broad grants of rulemaking authority have delegated the state-aid highway and street systems to the exclusive province of the Commissioner who has plenary authority to adopt any rule regarding their establishment, location, construction, reconstruction, improvement and maintenance he or she deems appropriate as long as the rule does not conflict with a specific provision of Minn. Stat. c. 162 (1992).

The Associated General Contractors of Minnesota argue that the absence of specific authorization in chapter 162 for inclusion of the state-aid systems in the set-aside programs established in Minn. Stat. § 161.321 (1992), establishes that the extension of the set-aside programs to the state-aid system was not intended by the Legislature.

To evaluate the arguments of the commentators, it is appropriate to review Minnesota law relating to the discretion of an administrative official in implementing a general grant of rulemaking authority.

A number of Minnesota decisions, initially, recognized three distinct types of rules and applied different legal consequences to each, depending on the appropriate classification. A number of such cases and several commentators have discussed the following types of administrative rules: legislative; interpretative; and procedural. See, McKee v. Likins, 261 N.W.2d 566 (Minn. 1977); Minnesota-Dakota Retail Hardware Association v. State, 279 N.W.2d 360 (Minn. 1979); St. Otto's Home v. Department of Human Services, 437 N.W.2d 35 (Minn. 1989); Christian Nursing Center v. Department of Human Services, 419 N.W.2d 86 (Minn. App. 1988); Beck, Bakken & Muck, Minnesota Administrative Procedure, 344-49 (Butterworths 1987). The Office of the Attorney General, in its Brief, also analyzes the rulemaking power of the Commissioner in this case under the three general rubrics.

It is doubtful that the distinction relating to types of rules, initially recognized by the Minnesota Supreme Court in McKee v. Likins, 261 N.W.2d 566 (Minn. 1977), continues to have any practical vitality after the 1981 amendment to the APA which provides that every rule, regardless of whether it is termed a substantive, procedural or interpretative rule which is promulgated in accordance with the APA, has the force and effect of law. If the distinction is at all important, however, the Administrative Law Judge finds that the rules are either legislative or procedural. As will be discussed, the classification of the rule as either procedural or legislative does not affect the Administrative Law Judge's determination in this case, since the Commissioner has received the broad grants of authority to promulgate rules previously noted.

The Office of the Attorney General, in its Brief, cites a number of Minnesota cases for the proposition that under a broad grant of rulemaking authority the Commissioner is entitled to promulgate any rule with respect to the state-aid highway and street systems that is not expressly prohibited by Minn. Stat. c. 162 (1992). The Administrative Law Judge, after reviewing the cases relied upon by the Office of the Attorney General and other relevant decisions, determines that a different test is more appropriate.

The Minnesota courts have allowed the Legislature to delegate to administrative agencies such authority as is necessary to allow them to achieve their functions. As recognized by the court in State v. King, 237 N.W.2d 693, 697 (Minn. 1977), the court has chosen to view legislative delegation liberally in order to facilitate the administration of laws which are complex in their application and within the particular expertise of an agency. See, Anderson v. Commissioner of Highways, 126 N.W.2d 778 (1964). The Legislature must, however, declare the public policy in the statute which grants the rulemaking authority and articulate reasonable parameters for the exercise of that authority. State v. King, supra. Irrespective of whether the test is phrased in terms of reasonable relationship to powers expressly granted in the statute, implied power, or furtherance of the legislative purpose, the appropriate test to be distilled from the various Minnesota cases is that the court must identify the elements of the enabling statute and match the proposed rules against those elements. If the rules proposed further the statutory elements, the rule is authorized. See, Hurley v. Chaffee, 43 N.W.2d 281 (Minn. 1950) (broad grant of rulemaking authority; test -- adopted in furtherance of the performance of its function); Welsand v. State, 88 N.W.2d 834 (Minn. 1958) (broad grant of rulemaking authority; test -- reasonably necessary within the area of authorized regulation); State, by Spannaus v. Hoff, 323 N.W.2d 746 (Minn. 1982) (broad grant of rulemaking authority; test -- classification carrying out the purpose of the

act); Mammenga v. Department of Human Services, 442 N.W.2d 786 (broad grant of rulemaking authority; test -- reasonable in light of the purpose of the statute); A+ v. Commissioner of Jobs and Training, 494 N.W.2d 522 (Minn. App. 1993) (broad grant of rulemaking authority; test -- reasonably related to legislative purpose); Christian Nursing Center v. Department of Human Services, 419 N.W.2d 86 (Minn. App. 1988); (broad grant of rulemaking authority; test -- reasonableness of the rule in light of the statutory purpose); Norman v. Commissioner of Public Safety, 404 N.W.2d 315 (Minn. App. 1987) (broad grant of rulemaking authority; test -- reasonable relation to powers expressly delegated). See, Wisconsin Hospital Association v. Natural Resources Board, 457 N.W.2d 879 (Wis. App. 1990); Debeck v. Wisconsin DNR, 493 N.W.2d 234 (Wis. App. 1992).

Certainly, the appropriate test is somewhat general when there has been a broad grant of rulemaking authority. The caselaw, however, requires that the rules be reasonably related to the specific delegations of legislative authority contained in the statute being cited as the source for rulemaking authority. Such rules must advance the legislative purpose expressed in the statute. Even if not specifically prohibited by the statute under construction, the Commissioner may not adopt rules under a broad grant of rulemaking authority that is not within the legislative purpose or intent. Buhs v. State Department of Public Welfare, 306 N.W.2d 127, 131 (Minn. 1981).

The record of this proceeding and the legislative history of the set-aside programs make the question here presented governed by the reasoning of the Minnesota court in State v. Lloyd A. Fry Roofing Co., 246 N.W.2d 696, 700 (Minn. 1976). In that case, the Minnesota court was reviewing the authority of the Minnesota Pollution Control Agency to enforce air pollution control standards. The grant of specific authority gave the agency significant rulemaking authority in the air pollution area but did not expressly mention the power to issue rules authorizing enforcement orders. However, the Legislature had expressly authorized the agency to issue such rules and subsequent enforcement orders concerning water pollution. From a comparison of the statutes relating to water and air pollution, the Minnesota court concluded that the Legislature did not intend to authorize rules allowing orders concerning air pollution. The court noted that the difference in legislative history between the water pollution statutes and the air pollution statutes and their internal provisions would prohibit the court from finding the necessary statutory authority under the air pollution statutes. The court held that the Legislature could have given a specific grant of the authority in question as it had done in a separate, inapplicable statute. Finally, in an often-quoted footnote, the court stated:

If the PCA needs such authority to effectively carry out its function regarding air pollution, the proper place for it to seek such authority is the legislative body which created the agency and specified its powers. Courts cannot properly aid the agency by construing the statute to confer upon it implicit authority, when to do so would contravene the legislature's apparently deliberate failure to explicitly grant it such authority.

State v. Lloyd A. Fry Roofing Co., 246 N.W.2d at 700, fn. 6. See, Francis v. Minnesota Board of Barber Examiners, 256 N.W.2d 521 (Minn. 1977).

The Administrative Law Judge finds that the rules are not reasonably related to the subject matter of the state-aid county highway and city street systems as that subject matter has been committed to the Commissioner by the Legislature. Specifically, the Legislature dealt with that subject matter in Minn. Stat. § 161.321 (1992), after a lengthy investigation by an interim legislative commission. In the 1990

amendments, the Legislature chose to specifically authorize the set-aside programs for TGBs with respect to the state trunk highway system. At the same time, at least with respect to municipalities, it made such programs permissive. Whenever the Legislature has dealt with the subject matter of set-aside preferences, it has done so through specific legislation. No state agency has initiated a program of TGB set-asides without a specific legislative grant of authority to do so. Finally, the report of the Legislative Commission established to review the question of set-asides to make the Minnesota program comply with the two United States Supreme Court decisions previously discussed, related its study and recommendations, at least as regards the Department of Transportation, to those instances in which the state is a contracting party for state contracts within the state trunk highway system.

The Administrative Law Judge specifically finds that the Commissioner does not have statutory authority to adopt the proposed rules by virtue of those portions of Minn. Stat. c. 162 (1992), that were relied upon by the Attorney General's Office in its Brief. The formation of a set-aside program by rule is not a reasonable extension of the general authority of the Commissioner to oversee the county state-aid and city-aid street systems. The subject matter of affirmative action and remedying past discrimination is a subject matter related either to economic development or social betterment. Neither objective is inherent in the formulation of a system of roadways. The Administrative Law Judge takes no position on the policy goals inherent in Minn. Stat. § 161.321 (1992). The administrative agency may not, however, substitute its policy judgment for that of the Legislature, irrespective of the worthiness of the policy judgment in an abstract sense. Niagara of Wisconsin Paper Corporation v. Wisconsin DNR, 268 N.W.2d 153, 160 (Wis. 1978); Debeck v. Wisconsin DNR, 493 N.W.2d 234, 237 (Wis. App. 1992). The Administrative Law Judge believes that the subject of set-asides is far enough removed from the functions committed to the Commissioner by Minn. Stat. c. 162 (1992), and is fraught with so many sensitive policy choices, that the appropriate determination of the issue is to be made by the Legislature and not an administrative agency under its general rulemkaing authority. As noted by the court in McKee v. Likins, 261 N.W.2d 566, 578 (Minn. 1977), quoting Maher v. Roe, 432 U.S. 464, 479, 97 S. Ct. 2376, 2385 (1977):

The decision . . . is fraught with judgments of policy and value over which opinions are sharply divided . . . . Indeed, when an issue involves policy choices as sensitive as those implicated . . . the appropriate forum for their resolution in a democracy is the legislature.

It could be argued that the underlying policy determination has already been made by the Legislature and the Commissioner would only be extending that policy to an additional area that has been recognized by the courts as involving the use of state funds. However, no disadvantaged person in the abstract, has a right to affirmative action or preference where state funds are being used. Khalifa v. State, 397 N.W.2d 388-89 (Minn. App. 1986). The circumstances under which the affirmative action set-aside programs contained in Minn. Stat. § 161.321 (1992), should be extended to state funds used locally, the impact of that decision on other state-aid fund programs and the appropriate limitations, if any, to be placed on such a program should be specifically reviewed by the Legislature.

Since the Commissioner lacks statutory authority to adopt the proposed rules, the rules may not be adopted. The Commissioner should seek appropriate legislative authority for the promulgation of such rules if he believes they are appropriate. State v. Lloyd A. Fry Roofing Co., 246 N.W.2d 696, 700, fn. 6 (Minn. 1976).

Small Business Considerations

13. Minn. Stat. § 14.115, subd. 2 (1992), requires the Agency, when proposing rules that may affect small businesses to consider stated methods for reducing the impact on such small businesses. These proposed rules may affect small businesses as defined in Minn. Stat. § 14.115 (1992). The possible effect is twofold. Small businesses that are prime contractors receiving state-aid contracts may be subject to additional reporting and compliance requirements. Moreover, small businesses that currently subcontract with prime contractors on state-aid projects may, to an extent, be replaced by TGBs because of the goals for the use of such businesses that are required to be set. Tr. 41; Tr. 57; Tr. 82. The Commissioner, in the SONAR, at p. 2, has documented the consideration given to small business concerns in this rulemaking proceeding, as required by Minn. Stat. § 14.15, subd. 2 (1992).

The major accommodation made to small businesses under the proposed rules is to limit the scope to contracts of at least $300,000 in state-aid funds. This will minimize the impact on non-TGB small businesses for smaller contracts and it will make the reporting requirements applicable only to larger contracts where the reporting would be more cost-effective.

The Department solicited comments from all members of the public. This solicitation included comments from small businesses, including prime contractors, TGBs and competing small businesses that are not TGBs. To accommodate the competing interests, the Commissioner has limited the application of the rules as previously discussed. Minn. Stat. § 14.115, subd. 2 (1992). The Commissioner's objective in this rulemaking proceeding was to establish only those requirements directly mandated or permitted by Minn. Stat. § 161.321 (1992), or those necessary to implement, administer or enforce that section.

14. The Administrative Law Judge also finds that the Commissioner has followed Minn. Stat. § 14.115, subd. 4 (1992), by encouraging small business to participate in the rulemaking hearing. He included in the Notice for Hearing a statement that the proposed rules would have an impact on small businesses. Ex. C, p. 4. The Administrative Law Judge, therefore, finds, that the Commissioner has complied, in all respects, with Minn. Stat. § 14.115 (1992).

Expenditure of Public Money by Local Public Bodies

15. Minn. Stat. § 14.11, subd. 1 (1992), requires the Agency to include a statement of the rule's estimated cost to local bodies in the Notice of Intent to Adopt Rules, if the rule would have a total cost of over $100,000 to all local bodies in the state in either of the two years immediately following the adoption of the rule. Mn/DOT has estimated that 203 local agencies will cumulatively incur $325,000 of additional expenditures a year if the proposed rules are adopted. The Agency complied in all respects with Minn. Stat. § 14.11, subd. 1 (1992), by including in its Notice of Hearing, Ex. C, p. 4, a statement of the required expenditure of public money by local public bodies, to stimulate local governmental participation in this rulemaking hearing.

Discussion of the Proposed Rules

16. The Administrative Law Judge has found that the Commissioner of Transportation does not have the statutory authority to adopt the proposed rules. Under the Administrative Procedure Act, this negative finding by the Administrative Law Judge must be reviewed and approved by the Chief Administrative Law Judge. The Administrative Law Judge will, therefore, analyze the proposed rules and the rulemaking record for purposes of judicial economy to avoid a remand in the event that the Chief Administrative Law Judge does not accept the Administrative Law Judge's ruling with respect to the Commissioner's statutory authority to adopt the proposed rules. Because additional negative findings are also made, the discussion will also aid the Agency in formulating appropriate rules, at some later date, if the decision of the Administrative Law Judge with regarding the Commissioner's statutory authority is upheld and the Department later receives the requisite statutory authority.

General Comments

17. A number of commentators made statements and provided written submissions which do not relate directly to any specific portion of the proposed rules but are made, rather, about the subject matter in general. The Administrative Law Judge will discuss those general comments prior to making an analysis of each rule provision proposed.

Public Policy of Set-Aside or Preference Programs

18. Predictably, a number of persons commented on the general subject matter of the propriety of remedial action through set-aside or preference goals for TGBs. Generally, those persons who would gain by the application of preference goals testified in favor of the justice of the rules. Tr. 52; Tr. 59; Tr. 75; Tr. 92-93; Tr. 101; Tr. 104; Comments of the Inter Governmental Compliance Institute, Inc., March 25, 1994; Comments of Helen M. Nagel, Inc., March 8, 1994; Pub. Ex. 2 -- National Association of Minority Contractors. Also, predictably, those persons who could lose business to TGBs under the proposed rules opposed the concept of a goal preference. Tr. 64; Tr. 83; Tr. 87-89; Comments of Bemidji Blacktop, Inc., received March 11, 1994; Comments of Bituminous Materials, Inc., March 7, 1994; Comments of Kern & Tabery, Inc., March 9, 1994; Comments of Mathiowetz Construction Co., March 16, 1994; Comments of Minnesota Land Improvement Contractors of America, March 14, 1994; Comments of Prinsburg Sodding Co., March 10, 1994; Comments of Rajala Construction Co., Inc., March 24, 1994; Comments of Reierson Construction, March 10, 1994; Comments of Sellin Brothers, Inc., March 10, 1994; Comments of Sorensen Bros. Inc., March 16, 1994; Comments of Weerts Construction, Inc., March 16, 1994; Comments of Gohman Construction Products, March 7, 1994; Comments of the City of Fairmont, March 17, 1994; Comments of the Jackson County Highway Department, March 23, 1994; Comments of Nobles County Office of Highway Engineer, March 22, 1994.

The proponents of the rules argue that open competition simply has not worked. Because of the presence of discrimination and a variety of factors explained at length in the report of the Legislative Commission on Small Business Procurement: A Foot in the Door, January 31, 1990, some type of assistance to TGBs is necessary, at least on a temporary basis, until the effects of discrimination can be destroyed. Opponents of preference goals argue that it is the American way to have competition on a level playing field. Some small business contractors will lose needed business which they can ill-afford to TGBs that will receive a preference under the proposed rules. Several commentators also suggested that it is more inconvenient and costly to do business with TGBs. Finally, a number of outstate commentators suggest that there are few, if

any, TGBs in Minnesota. Any such subcontractors used would come from the larger metropolitan areas, diverting funds from local businesses to the detriment of the rural economies.

The Administrative Law Judge has previously found that the Commissioner does not have statutory authority to adopt the proposed rules. It is precisely the types of policy judgments inherent in the previous discussion and their impact on rural Minnesota that should be the subject of policymaking by the Legislature and not the Commissioner. If it is assumed, however, that the Commissioner does have the requisite rulemaking authority, the policy goals inherent in the proposed rules are not unreasonable and have been determined, in other contexts, to reflect remedial public policy. It is not the function of the Administrative Law Judge to determine which policy goal, if any, represents the "best" solution to a problem. An agency is entitled to choose among possible alternative standards so long as the choice is a rational one. An agency may demonstrate the propriety of its policy judgments by showing that the rule is rationally related to the end sought to be achieved. Blocher Outdoor Advertising Co. v. Minnesota Department of Transportation, 347 N.W.2d 88 (Minn. App. 1984). The policy goal of remedial action for discrimination is certainly a rational policy choice among the various alternatives that might be selected.

Difficulty of Administration

19. Several local units of government commented that the State is in the habit of placing additional requirements on local units of government which require the expenditure of time and funds without providing the means to defray those additional expenses. Comments of Blue Earth County Director of Public Works, March 24, 1994; Comments of Martin County Department of Highways, March 18, 1994; Comments of Nicollet County Department of Highways, March 22, 1994. The Administrative Law Judge finds that the Commissioner, by limiting the proposed rules to contracts in excess of $300,000 in state-aid funds, has minimized, to the largest extent possible, any adverse impact the proposed rules may have on local units of government.

Shortage of Willing TGBs

20. Many comments were received by contractors, subcontractors and county engineers that there are few, if any, TGB contractors willing to accept work in rural Minnesota. The consequence would be either highly inflated bid prices to bring metropolitan TGBs from the Twin Cities area or burdensome paperwork for processing waivers. As discussed by the Department of Transportation at page 8 of its Reply Comments, April 4, 1994, however, there are many TGBs willing to work in every area of the state. Moreover, as testified to by LaVonne Phillips, President of Phillips & Marsh Corporation in Rochester, Minnesota, outstate Minnesota is becoming more and more culturally diverse. For instance, in Rochester, Minnesota, between 1980 and 1990, the population grew by 10,000 people. Over 50% of that population growth consisted of African-Americans and Southeast Asians. Tr. 102-03.

The shortage of minority contractors in outstate Minnesota may also be partially a chicken-or-egg problem. In the absence of TGB goals applicable to outstate Minnesota, there is no incentive for such contractors or subcontractors to locate or become initially established in outstate Minnesota. The Administrative Law Judge finds that the uneven distribution of TGBs in Minnesota is not a reason for rejecting the proposed rules.

Definition of Minority

21. One commentator requested that the term "minority" be properly used and defined in the rules. As discussed by the Department in their Reply Comments of April 4, 1994, at p. 7, the definition of a targeted group business and eligibility criteria for becoming a targeted group business are the responsibility of the Commissioner of Administration pursuant to statute and rule. These determinations must be accepted by the Commissioner of Highways.

Rules Committee Membership

22. Mr. Phillips argued that the rules committees that initially consulted with the Commissioner to establish the proposed rules should have had TGB representation. As discussed at the hearing, and as stated by the Department in its Reply Comments of April 4, 1994, at p. 8, the membership of the rules committees is determined by Minn. Stat. §§ 162.02, subd. 2 and 162.09, subd. 2 (1992). It is not within the authority of the Commissioner of Transportation to change the rule committee membership. The Department did, however, mail notice to TGBs whose names were on file with the Department's EEO office.

Funding

23. John Leseman, of Thorson, Inc., commented that if TGB programs are appropriate, they constitute social welfare programs and should be funded out of the general fund. Tr. 56. As recognized by the Legislative Commission on Small Business Procurement in their 1990 report, however, these types of affirmative action programs have never been intended as a social program, but rather as an economic development initiative that would benefit not only the companies involved but also the entire state. That same comment is reflected at page 9 of the Department's Reply Comments of April 4, 1994.

Part 8820.2950 - Targeted Group Business Contracts

Part 8820.2950, subp. 1 -- Scope.

24. Part 8820.2950, subp. 1 provides that this part applies to all city and county contracts equalling or exceeding $300,000 in state-aid funds, state funds, state-aid bonds, and state bonds. Hence, the rules will not apply to any contracts where the "state funds" are less than $300,000, unless the locality elects pursuant to a separate provision to have the local participation amounts included. Persons supporting TGB goals generally commented that the selection of a $300,000 contract minimum was inappropriate. The TGBs generally argued that the correct minimum contract figure should be less, many arguing the program should apply irrespective of the amount of "state funds" involved. Comments of Carroll Franck & Associates, March 28, 1994, p. 1; Comments of Empowering Women's Group, March 28, 1994, p. 1; Comments of Inter Governmental Compliance Institute, Inc., March 25, 1994, p. 1; Tr. 52; Tr. 66-67; Tr. 93-94; Tr. 107; Tr. 112. The principal concern voiced by TGBs was that limiting participation to contracts with "state funds" in excess of $300,000 would eliminate business for smaller TGBs, so that many would never even form for the purpose of conducting business. With others, it was a matter of equity. Because of past injustice in contracting with the state, TGBs should be allowed to maximize their participation in public contracting and not be limited to larger contracts. A number of proposed cutoff points between zero and $300,000 were also discussed as a suitable lower threshold for participation.

Other commentators, including representatives of local governmental bodies, argued that the rulemaking would result in significant additional cost to local units of government in the administration of their contracting activities. They argued, that if the rules were to be adopted, the threshold should be maintained and, if anything, increased. Other commentators argued that the participation threshold should be somewhere between $300,000 and half a million dollars, if the rules are adopted.

25. The Department presented and discussed on the record a sheet entitled "What If" that justified that $300,000 threshold. The discussion of the "What If" informational sheet is contained at Dept. Ex. O and pp. 35-40 of the hearing transcript. The Agency presented evidence which, in its mind, made $300,000 the appropriate point at which any increased incentives to TGBs were not outweighed by administration costs to the local units of government. The Administrative Law Judge finds that Part 8820.2950, subp. 1 is needed and reasonable. The Agency has demonstrated a rational basis for selecting the $300,000 limitation as previously discussed. An agency has authority to adopt reasonable definitions and reasonable classifications. Welsand v. State Railroad and Warehouse Commission, 88 N.W.2d 834, 838 (Minn. 1958).

Minn. Rule 8820.2950, subp. 2 -- Definitions

26. Items A, D, G, H and I of subpart 2 received no adverse public comment. The Agency substantiated the need for and reasonableness of these items by an affirmative presentation of fact in the SONAR. These items of subpart 2 are, therefore, found to be needed and reasonable.

27. Subpart B defines the term "Commissioner's designee". The initial drafts of the rule allowed any member of the Department selected by the Commissioner to be given the responsibility for the administration of the state-aid targeted group business program. A number of commentators stated that the Commissioner's designee should automatically be the head of the equal employment opportunity office responsible for such contract management within the Department. It was asserted that individual possesses the necessary expertise to administer the program uniquely. Prior to the hearing, the Department proposed the amendment to Part 8820.2950, subp. 2B, contained in Appendix A hereto, making the Commissioner's designee the head of the Department's EEO contract management office. Because the head of the EEO office of the Department specializes in minority business matters within the Department, it is both needed and reasonable to specifically denominate that individual in the definition of item B as the Commissioner's designee. The amendment to this item did not constitute a prohibited substantial change because the amendment does not go to a different subject matter, narrows the application of the rule, rather than enlarges it, and was made in response to public comments.

28. Item C of Part 8820.2950, subp. 2 relates to the definition of the word "contract". That definition is phrased in terms of a contract for road construction between a contractor and a local highway or street department for constructing transportation improvements which is funded in whole or in part by state-aid funds, state funds, state-aid bonds, or state bonds. The definition specifically excludes contracts for consultant engineering services. A number of commentators argued that it was inappropriate to exclude engineering services from the application of the rules. Those commentators stated that disadvantaged consultant engineers need as much assistance for contractor acceptance as do TGB construction subcontractors. Comments of Carroll Franck & Associates, March 28, 1994; Comments of Empowering Women's Group, March 28, 1994; Comments of Inter Governmental Compliance

Institute, Inc., March 25, 1994; Comments of Lynn Bly & Associates, Inc., March 24, 1994; Comments of Rani Engineering, Inc., March 17, 1994; Comments of Singh & Singh, March 28, 1994. Other commentators supported the exclusion of professional engineering services from the TGB program. Comments of the City of Fairmont, March 17, 1994. The Department's reasoning behind its exclusion of professional consulting engineer services is contained at pages 41-43 of the hearing transcript and at pages 13-14 of the Department's Reply Comments of April 4, 1994. The Administrative Law Judge accepts the reasoning of the Commissioner for the exclusion of professional engineering services for both legal and practical reasons. The Administrative Law Judge further finds that the Department has demonstrated the need for and reasonableness of the proposed definition by an affirmative presentation of fact in the record.

29. Item E of Part 8820.2950, subp. 2 defines the term "contractor". Two commentators suggested an amendment to this item that would include services necessary for or incidental to the planning and design of state-aid highway projects to include consultant contracts for engineering services within the proposed rules. Comments of Empowering Women's Group, March 28, 1994; Comments of Lynne Bly & Associates, Inc., March 24, 1994. For the reasons previously discussed in Finding 28, supra, the Administrative Law Judge finds that the definition of the word "contractor" which excludes activities that are not incidental to construction from the definition is needed and reasonable.

30. Item F of Part 8820.2950, subp. 2 defines the word "goal". A goal within the meaning of the rules is the percentage of the total amount of state funds within a contract that is to be subcontracted to targeted group businesses. The Department amended the definition to include the following:

The goal may be to reserve the contract for bidding by only targeted group businesses.

A number of commentators suggested that the goal and the $300,000 limitation should not be based strictly on the amount of state funds involved in the project but should include all governmental funds involved, whether local or state provided. Comments of Empowering Women's Group, March 28, 1994. A second concern with this definition is that it limits participation to a subcontractor role. Several commentators argued that the word "contracted" should be included before the word "subcontracted" so that a TGB could participate in the program by being a prime contractor as well as a subcontractor. See, e.g., Comments of Carroll Franck & Associates, March 28, 1994; Comments of Empowering Women's Group, March 28, 1994. Finally, a number of commentators argued that it was appropriate to avoid goals on all contracts involving state funds. Rather, certain contracts that are appropriate for TGBs should be reserved to TGBs.

Since these rules are based on Minn. Stat. § 161.321 (1992), which relates only to subcontracting, and it is the desire of the Commissioner to extend this section to state-aid contracts, it is appropriate to limit the rule to subcontracting for TGBs. Moreover, the amendment to Minn. Stat. § 471.345, subd. 8 (1992), contained in Laws of 1990, c. 541, § 26, makes municipal participation in a TGB program on its "anticipated total procurement of goods and services, including construction" optional rather than mandatory. The Administrative Law Judge, therefore, finds that the definition contained in subpart 2 of item F is both needed and reasonable. The amendment to item F does not constitute a prohibited substantial change because it

does not go to a new subject matter, does not result in a rule that is fundamentally different and was made in response to public hearing comments.

Part 8820.2950, subp. 3 -- Targeted Group Business Goals

31. Item A of subpart 3 relates to the setting of a goal by the city or county engineer jointly with the Commissioner's designee for the amount of subcontracting to TGBs in a particular contract based on the items listed in subitem (1), (2) and (3). There is no specification in the rule of a minimum or maximum goal on a particular project contract. TGB participation could vary from zero percent to 100% depending on a variety of factors. Subitem 2 of item A determines that the goal must be based on the estimated portion of the contract to be funded by state funds and may include local funds at the discretion of the local agency. Subitem 3 states that the goal may be attained by means of an approved subcontract and equipment lease agreement, a joint venture that must be preapproved by the Commissioner's designee, other services preapproved by the Department of Administration in their product area. If the goal is attained or contributed to through the use of TGB product suppliers, 60% of the suppliers contract amount will be credited toward the goal. Subitem 4 requires that the TGB goal contract specifications must be supplied by the Commissioner's designee and included in the contract proposal by the contracting authority. Both prior to the hearing and as a consequence of subsequent public comments, the Department amended subpart 3, item A and subpart 3, item A(1), (2) and (3).

32. Subpart 3, item A requires that the city or county engineer and the Commissioner's designee, who is the head of the Department's EEO office, consult and set goals. This provision must also be read in light of subpart 3C of this part where a final determination by the state-aid engineer is made when the Commissioner's designee and the local authority cannot reach agreement on the goals. As a consequence of the comments made at the public hearing, subpart 3, item A was amended, only as to style, to require the joint setting of a goal. A number of commentators at the hearing argued that, while public input at the local level was relevant, the final and binding decision should be made by the Commissioner's designee, the head of the EEO office of the Department. They opposed requiring joint agreement or final decisionmaking authority by the state-aid engineer, who, presumably, is not an expert in EEO matters. Comments of Empowering Women's Group, March 28, 1994, p. 2; Comments of Lawn & Driveway Service, Inc., March 22, 1994; Comments of Lynne Bly & Associates, Inc., March 24, 1994. Some commentators expressed disapproval of the idea of allowing the Commissioner's designee to set final goals for the TGB contract program, as suggested by some other commentators. Comments of City of Fairmont, March 17, 1994; but see, Comments of Hennepin County, March 7, 1994, p. 2. Other commentators argued that the county or city engineer alone should set the goal because of greater knowledge of local conditions. Some local units of government believe that an EEO office would be unable to set realistic goals with particular knowledge of local conditions.

The Department in its Reply Comments of April 4, 1994, states that it has advanced a reasonable, middle ground position where the local unit of government has significant initial participation and can make the Department more knowledgeable about local conditions and the state retains some control over the use of local state-aid funds with the check and balance of a neutral decisionmaker not associated with the DOT EEO office. Presumably, the local unit of government would stress local considerations and the DOT EEO office may have some at least perceived tendency to stress EEO goals, without appropriate consideration of local conditions.

As previously noted, it is not the responsibility of the Administrative Law Judge to determine what is the "best" solution amongst policy choices. An agency may demonstrate the reasonableness of its proposed rule by showing that the rule is rationally related to the end sought to be achieved. Blocher Outdoor Advertising Co. v. Minnesota Department of Transportation, supra. While differing parties may balance the policy choices differently, the choice made by the Agency is a rational determination.

The Administrative Law Judge, at the hearing, raised the issue of the specificity of subpart 3, item A in that no minimum or maximum amount is set for the goal which may be fixed on a particular contract. The Agency argues, in its Response to Public Comments, that significant flexibility is required in goal-setting because of the constantly changing conditions present in the bidding market. In other words, the goal for one contract might be different at any given time depending upon factors such as location of the project, distance to the nearest TGB contractors with the needed specialties, the size of the contract, the number of other contracts being let in that area, the number of contracts let in other areas, the type of work involved and the practicality of subcontracting any of the work. The Department concluded that TGB goals in contracts need to be flexible because goals will depend upon the type of work involved and the availability of certified, willing and able TGBs. Requiring a specific set goal to be achieved would be unreasonable and inappropriate for rulemaking, the Department contends. Also, developing goals in accordance with the conditions of the contract and the related market allows the EEO office to exceed typical goals where opportunities are abundant and to reduce or eliminate goals on projects that will not provide opportunity. This flexibility reduces the administrative burden on the Department and the local agencies of processing waivers.

It should be noted that the goal flexibility contained in this subpart is as specific as the Department of Administration rule, Part 1230.1820, subp. 1, which implements the same program within the Department of Administration.

The Administrative Law Judge accepts the reasoning of the Department. The exercise of discretion contained in subpart 3, item A is limited by the standard for decision provided in subitem (1), (2) and (3). To achieve the purposes of the entire program, no greater specificity is reasonably possible. If a rule furnishes a reasonably clear policy or standard which controls and guides the agency so that the law or rule takes effect without exercise of whim or caprice by the administrative officers, the rule is sufficiently specific. Anderson v. Commissioner of Highways, 126 N.W.2d 778, 780 (Minn. 1984); City of Livonia v. Department of Social Services, 333 N.W.2d 151, 158 (Mich. App. 1983), aff'd, 378 N.W.2d 402, 418-20 (Mich. 1985). As previously noted, the standard contained in this subpart and the ability to set goals from zero to 100% is not only inherent in the nature of the subject matter, City of New Brighton v. Metropolitan Council, 237 N.W.2d 620, 625 (Minn. 1975), but it is also as specific as other rules on the subject matter that have been approved for the Department of Administration.

33. Subitem 2 of item A provides that the local unit of government has the option of including within the goal the total contract value, including local funds. A number of public commentators, as previously discussed, stated that this should be mandatory. Other commentators, particularly local units of government, stated that it should remain optional. For the reasons previously discussed in Finding 30, supra, the Administrative Law Judge finds that it is consistent with the legislative history of the 1990 session law previously discussed, and other historical set-aside programs to

provide an option to the local units of government, rather than mandating inclusion of local funds in the goal.

34. Subitem 3 of item a, as previously discussed, states the manner in which the goal may be attained. The content and amendments to subpart 3A(3) resulted from comments made at the public hearing and were meant to clarify the manner in which compliance may be secured. The amendments to item A(3) communicate the original intent which was not to allow full credit for suppliers, while also clearly stating the other acceptable ways of meeting the goal. The provision is consistent with the Department of Administration rule Part 1230.1820, subp. 1, governing the Department of Administration's TGB program.

35. For the reasons previously discussed in Findings 31-34, supra, the Administrative Law Judge finds that Part 8820.2950, subp. 3A(1), (2) and (3) have been demonstrated to be needed and reasonable by an affirmative presentation of fact. The changes to this portion of the rule that the Agency proposed either at the hearing or as a consequence of comments made at the hearing do not constitute prohibited substantial changes within the meaning of Minn. Stat. § 14.15, subd. 3 (1992) and Minn. Rules, pt. 1400.1000, subp. 1, pt. 1400.1100 (1991). The amendments are clarifying amendments and do not go to an additional subject matter or expand the coverage of the rule.

36. Part 8820.2950, subp. 3A(4) requires that targeted group business goal contract specifications must be developed and supplied by the Commissioner's designee and included in the contract proposal by the contracting authority. This subitem must also be read in light of Part 8820.2950, subp. 3E which gives the Commissioner's designee unlimited authority to "establish procedures and be responsible for contract monitoring, investigation of noncompliance, and execution of liquidated damages." It is intended that virtually all portions of the program other than the goal-setting be determined by the EEO officer, as the Commissioner's designee and included in each contract. This would include many substantive areas of unlimited discretion. For example, nowhere in the rules is there a statement of what occurs if a goal is not met. Will damages be imposed, will the bidder be disqualified from participating, will damages be added to the apparent low bid? These subject matters are within the sole discretion of the Commissioner's designee, the EEO officer, without engaging in a rulemaking proceeding or receiving any particular input or direction from any other member of the Department or local units of government. Such unbridled discretion with no standard is an improper delegation of authority from the Department in its rulemaking to another subsidiary individual. Without discernible standards and with unlimited discretion in the EEO officer,
subp. 3A(4) of the rule is impermissibly vague and does not meet the definition of a rule contained in Minn. Stat. § 14.02, subd. 4 (1992). Anderson v. Commissioner of Highways, 126 N.W.2d 778, 780 (Minn. 1964); Papachristau v. City of Jacksonville, 405 U.S. 156, 170 (1972); Holmes v. New York City Housing Authority, 398 F.2d 262, 265 (2d Cir. 1968); Historic Green Springs, Inc. v. Bergland, 497 F. Supp. 839, 854-55 (E.D. Va. 1980).

It is argued that there is no more specificity under current practice with respect to state contracts by the Department under Minn. Stat. § 161.321 (1992). It is not the purpose of the Administrative Law Judge to review or pass on the legality of the Commissioner's implementation of Minn. Stat.
§ 161.321 (1992). Subdivision 6 of that section authorizes the Commissioner to adopt rules to implement that section and also applies the rules of the Commissioner of Administration. The Commissioner of Highways has chosen not to adopt rules but,

instead, to formulate specifications which are apparently attached to state contracts. The document entered into the record as Exhibit N may be a prohibited unpromulgated rule. See, McKee v. Likins, 261 N.W.2d 566 (Minn. 1977); St. Otto's Home v. Department of Human Services, 437 N.W.2d 35, 42-43 (Minn. 1989).

It could be argued that the Commissioner has jurisdiction under Minn. Stat. § 161.321, subd. 6 (1992), to apply the rules of the Commissioner of Administration with respect to state contracts in this circumstance and, thereby, justify his use of specifications. The rules of the Commissioner of Administration entered into the record as Exhibit Q, however, are significantly more detailed than a grant of plenary authority to an EEO officer. They contain standards which reasonably limit the discretionary authority of the state decisionmaker outside of the rulemaking proceeding. The Administrative Law Judge has not compared the rules of the Department of Administration to the specifications currently being used on state contracts. As previously noted, it is not the purpose of the Administrative Law Judge to pass on the validity of the Department's actions regarding state contracts. With respect to proposed rules in this rulemaking proceeding, if the Department has requisite statutory authority to promulgate the proposed rules, it must set the most specific reasonable standards governing the exercise of discretion by the EEO officer in implementing these portions of the rules that are possible given the subject matter involved and the need for flexibility. As noted previously, the Department of Administration has included quite specific limitations in its rules.

37. To correct the defect, the Agency must formulate either in subpart 3A(4) or in subpart 3E, the type of standards and limitations discussed in the previous Finding. The Administrative Law Judge cannot suggest particular language that would solve the problem apart from an additional rulemaking proceeding. The Agency may certainly look to the standards contained in the rules of the Department of Administration and, perhaps, incorporate some of those rules. It might look to its contract specifications entered into the record of this rulemaking proceeding as Exhibit N. It may look to any portion of this rulemaking record. It may not, however, formulate criteria which are not supported in the record or constitute a prohibited substantial change.

38. Subpart 3, item B allows for a waiver if the prime contractor who is the apparent low bidder has not been able to meet the goal. The waiver under the amendment proposed after the hearing must be granted if "the prime contractor has documented a good faith effort to secure targeted group business subcontractors". The rule provides that documentation requirements and waiver conditions will be as provided in each contract's specifications. The item also authorizes waivers when, after the award and the commencement of the project, a TGB fails to perform there is no alternative TGB subcontractor available. Waivers are granted by joint agreement of the Commissioner's designee and the city or county engineer, subject to final decision in the event of disagreement by the state-aid engineer in accordance with the criteria contained in subpart 3A.

As previously discussed, the Administrative Law Judge finds that the standard contained in subpart 3A which is applicable to item B is sufficiently specific to avoid an inappropriately vague rule. However, there is no definition of the term "good faith" or statement of what documentation requirements will be made. For the reasons previously discussed in Finding 32 and 36, supra, the Administrative Law Judge finds that this portion of the rule is impermissibly vague as not defining good faith or including

a way in which good faith may be documented or in specifying even the rudiments of any procedure for obtaining a waiver.

39. To correct the defect, the Administrative Law Judge requires that the Agency, on the basis of the existing rulemaking record, formulate such specific provisions. The Agency may look to the rules of the Commissioner of Administration, its own contract conditions used in state contracts or the applicable federal regulations contained in the record as an attachment to the Comments of the Inter Governmental Compliance Institute, Inc., March 25, 1994. Any such additional criteria formulated must, however, be based on the existing record. Whether such amendments would constitute a prohibited substantial change would depend on the degree to which the Agency relies on the existing record and the content of such criteria.

40. Item D of Part 8820.2950, subp. 3 limits further subcontracting under the proposed rule by a subcontractor to 25% of the subcontract dollar amount except in the case of trucking which can be subcontracted 50% to a second subcontractor. One commentator suggested that this item be eliminated. Tr. 71. The purpose of the subcontracting rule is to give practical experience to TGBs by their performing subcontracts. It is not to give them the opportunity to, for a fee, subcontract significant portions of the project to non-TGB subcontractors. To allow them to do so would defeat the purpose of the rule. Moreover, the 25% limitation is consistent with Minn. Stat. § 161.321, subd. 3 (1992), which governs state contracts. The Department has demonstrated that the rule is needed and reasonable.

Part 8820.2950, subp. 4 -- Local Program Certification as Commissioner's Designee

41. One commentator argued that this should be eliminated because a trained EEO professional is necessary for program administration. This subpart is needed, however, because a number of the larger local agencies already operate successful local TGB assistance programs. This would make the Department's program a redundant effort. With this subpart, the local agencies will be able to operate their own local programs which will promote efficiency and the program at issue in this proceeding. Under the proposed rules, only the Commissioner's designee, the Department's EEO officer has the authority to allow the local unit of government to administer the program. That person would not do so if at any time he or she believed that the local unit was incapable of administering the program in accordance with its purposes. The Administrative Law Judge, therefore, finds that the Agency has demonstrated the need for and reasonableness of subpart 4 by an affirmative presentation of fact.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner gave proper notice of the hearing in this matter.

2. The Commissioner has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule.

3. That the Commissioner has not demonstrated his statutory authority to adopt the proposed rules.

4. Due to Conclusion 3, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

5. Any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

6. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Commissioner from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

It IS HEREBY RECOMMENDED: that the proposed rules not be adopted.

Dated this 26th day of May, 1994.

s/ Bruce D. Campbell
BRUCE D. CAMPBELL
Administrative Law Judge

Reported: Transcript by Karen Toughill.